

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

TRUSTEES OF THE BRICKLAYERS
PENSION TRUST FUND - METROPOLITAN
AREA, ET AL.,

Plaintiffs,

v.

Case No. 10-13884
Hon. Lawrence P. Zatkoff

OHIO BUILDING RESTORATION, INC.,
and DUANE HAAS,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION

This matter is before the Court on Plaintiffs' motion for reconsideration [dkt 6]. Pursuant to E.D. Mich. L.R. 7.1(g)(2), no response is permitted. The Court finds that the facts and legal arguments are adequately presented in Plaintiffs' papers such that the decision process would not be significantly aided by oral argument. Therefore, pursuant to E.D. Mich. L.R. 7.1(f)(2), it is hereby ORDERED that the motion be resolved on the brief submitted. For the reasons set forth below, Plaintiffs' motion for reconsideration is GRANTED.

Local Rule 7.1(g)(3) governs motions for reconsideration, stating that "the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication." E.D. Mich. L.R. 7.1(g)(3). The same subsection further states, "the movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case." *Id.* A defect is palpable when it is obvious, clear, unmistakable,

manifest, or plain. *Mktg. Displays, Inc. v. Traffix Devices, Inc.*, 971 F. Supp. 262, 278 (E.D. Mich. 1997).

On October 25, 2010, the Court issued an order dismissing Plaintiffs' Counts II and III, (declining to exercise supplemental jurisdiction over them) and retaining jurisdiction over Plaintiffs' Count I based on federal-question jurisdiction. Plaintiffs assert in their motion for reconsideration that the Court also has federal-question jurisdiction over Plaintiffs' Count III, and therefore, the Court should retain jurisdiction over it.

Pursuant to 28 U.S.C. § 1331, a district court shall have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." According to Plaintiffs, Count III is a claim based on 29 U.S.C. § 1109(A) of the Employee Retirement Income Security Act ("ERISA"), and requires the interpretation and application of ERISA. Plaintiffs point out to the Court that in a similar circumstance, the Court noted that "[n]umerous cases from this Court and other federal districts confirm that an individual defendant violates this section [of ERISA] by paying other creditors instead of making benefit fund payments, because benefit payments become fund property once they are due and owing." *Trs. of the Mich. Reg'l Council of Carpenters Empl. Benefit Fund v. Motor City Interiors, Inc.*, No. 05-74557, 2007 U.S. Dist. LEXIS 12885, at *6-7 (E.D. Mich. Feb 26, 2007). Plaintiffs also cite *Iron Workers' Local No. 25 Pension Fund v. McGuire Steel Erection, Inc.*, 352 F. Supp. 2d 794, 806-07 (E.D. Mich. 2004), which determined that diversion of the plan assets for purposes of financing a company's continued operations was a breach of a fiduciary duty giving rise to individual liability under ERISA.

Here, Count III is premised on Defendant Duane Haas's alleged failure to discharge his fiduciary duties in the interest of the beneficiaries of the ERISA plan when he directed unpaid fringe

benefit contributions to be paid to other creditors rather than being deposited in the Bricklayers pension fund. Therefore, it is clear and unmistakable that this action falls within the Court's federal-question jurisdiction because ERISA is a law of the United States and Defendant Duane Haas's breach of his fiduciary duties involves the interpretation and application of ERISA.

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' motion for reconsideration [dkt 6] is GRANTED and the Court retains jurisdiction over Plaintiffs' Count III.

IT IS SO ORDERED.

S/Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Dated: November 17, 2010

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Order was served upon the attorneys of record by electronic or U.S. mail on November 17, 2010.

S/Marie E. Verlinde
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